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IN THE SUPREME COURT OF THE STATE OF MICHIGAN

No. 44937½

GABRIEL GLANTZ,

Plaintiff,

vs.

MICHIGAN CORPORATION & SECURITIES COMMISSION AND PHILIP A. HART, COMMISSIONER.

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Michigan entered in this cause.

Opinion Below

The opinion of the Michigan Supreme Court was not reported. However, a copy of the opinion is attached hereto (Appendix A).

Jurisdiction

This suit, against an administrative body of the State of Michigan, the defendant Michigan Corporation & Securities Commission, was commenced in the Michigan Supreme

Court as prescribed by statute, 3 Compiled Laws 1929, Section 15186, M. S. A. 27.2230:

> "No Circuit Court shall have jurisdiction to issue writ of mandamus against any state officer."

With reference to the jurisdiction of the Michigan Supreme Court to entertain original mandamus against state officers, the attention of the court is respectfully directed to the case of *Thompson* v. *Auditor General,* 261 Michigan 624. It is perhaps appropriate to point out that the defendant Commission made no jurisdictional objections in its answer to plaintiff's petition in the Michigan Supreme Court.

The judgment of the Michigan Supreme Court was entered on September 11th, 1950. This petition for appeal is presented herewith on December 1st, 1950, within ninety (90) days from the entry of the order. 28 U. S. C. 2101 (c); rule 38½.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2); *Williams* v. *Bruffy,* 96 U. S. 176, 183.

Plaintiff requested an order from the Michigan Supreme Court directed to the defendant Commission to show cause why a writ of mandamus should not issue from the Michigan Supreme Court directing the Commission to issue a real estate broker's license to plaintiff, on the grounds that the statute, which the Commission cited as authorizing it to withhold plaintiff's broker's license was unconstitutional and void in that it was in violation of the Fourteenth Amendment to the Constitution of the United States.

The statute which defendant Commission alleges as authorizing it to order plaintiff to take a re-examination reads as follows, Section 451.208 Compiled Laws 1948; 19.798 Statutes Anno. 1949, C. U. M. Supp.

> "Provided, however, that the commission shall have the authority to require at its discretion written ex-

amination or written re-examination of brokers and/or salesmen, and in these cases that passing grades, satisfactory to the commission, shall be required as a condition precedent to re-issuance of licenses to such brokers and/or salesmen."

The claim of plaintiff that the above cited Michigan statute violated the Federal Constitution was clearly raised in his amendment to his original petition filed in the Michigan Supreme Court on July 27th, 1950. Said amendment reads as follows:

> "Petitioner amends the petition for a writ of mandamus hereinbefore filed by adding to paragraph 9 of said petition the following:
>
> 'and that said act is unconstitutional and void in that it violates the portions of the Constitution of the United States hereinafter named and set forth for the reasons hereinabove stated:
>
> 'Amendment V. No person shall be . . . deprived of life, liberty, or property, without due process of law;'
>
> Amendment, Article XIV, Section 1. No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The filing of said amendment to the original petition three days after the original petition was filed on July 24th, 1950 is allowed as a matter of right by Michigan Court Rule 26, Section 1:

> "Plaintiff may at any time before answer is put in, or within fifteen days thereafter, amend his declaration or bill of complaint, and defendant within fifteen days after his answer is put in may amend same, without leave of court and without costs."

The order of the Michigan Supreme Court (Appendix A) sustains the validity of the questioned statute as against

plaintiff's claim of the invalidity of the statute on the stated federal constitutional grounds.

Statement

Plaintiff, a practicing attorney in the State of Michigan, had been issued a real estate broker's license by defendant Commission on February 19th, 1948, after passing all tests, paying all fees and meeting all requirements of the Commission. Subsequently on September 29th, 1948, one Nina McKee, made a complaint against plaintiff. After an investigation by an investigator on the Commission staff, a citation was issued against plaintiff on November 15th, 1948 reading as follows:

"Complaint No. 10639

To Gabriel Glantz, Alger Realty Co., 2842 Woodward Ave., Detroit 1, Mich.:

You are hereby notified that after investigation of a complaint filed against you by Nina McKee, you are hereby cited to appear before this Commission at a Hearing to be held on Monday, December 6th, 1948, at two P. M., at 2000 Cadillac Square Building, Detroit, Michigan, to show cause why your license as a real estate broker should not be revoked or suspended upon the charges that, in performing or attempting to perform acts as a real estate broker, you have violated the real estate license law, Act 306, P. A. of 1919 as amended, Section 13:

(f) In that you have failed to account for $200 coming into your possession which belongs to Nina McKee, being part of a deposit retained by you, and given to you by Nina McKee, in the purchase of a rooming house located at 5159 Commonwealth, Detroit, Michigan, which deal was never consummated;

(j) All of which conduct constitutes dishonest and unfair dealing.

You are directed to bring with you all deeds, contracts, receipts, cancelled checks, maps, plats or any other paper or writing which may have any bearing on

the transaction involved in this hearing. Any party to this proceeding may, if desired, be represented by an attorney.

This Citation and Notice is issued in pursuance of Sections 13 and 14, Act 306, of the P. A. of 1919 as amended.

MICHIGAN CORPORATION AND SECURITIES COMMISSION,
By HOWARD M. WARNER,
Commissioner.

Dated at Detroit, Michigan this 15th day of November, A. D. 1948."

(Sections 13 and 14, Act 306, of the Public Acts of 1919, as amended, is also cited as M. S. A. 19.803.)

The above hearing ordered by defendant Commission was abandoned by the Commission for the reason that plaintiff's attorney delivered the sum claimed from plaintiff by said Nina McKee to Mr. Carlton G. Golm, the investigator who in turn transmitted said funds to Nina McKee. It is pertinent to point out that the Commission took no further action under its Citation of November 15th, 1948.

On December 20th, 1948, after the refund to the Commission's agent, plaintiff received an order from the Commission to take an examination, identified as Exhibit 3 of the Brief by Attorney General in opposition to issuance of order to show cause, and reading as follows:

"December 20, 1948.

"Dear Sir:

As a result of the complaint filed against you by Mrs. Nina McKee, Deputy Commissioner Harold G. Groehn has recommended that you be required to pass a written re-examination for real estate broker's license, before this matter is dismissed.

Therefore, will you please arrange to go to our Detroit office at your earliest convenience and write

this re-examination. No fee is charged, and you should allow yourself at least two hours in which to complete the work. In other words, do not attempt to start it after three in the afternoon.

Very truly yours,

NITA EASTON,
Complaint Clerk."

Plaintiff refused to take said examination, and defendant Commission took no further action until fifteen (15) months later, when it refused to re-issue plaintiff's license. On March 6th, 1950, defendant Commission dispatched the letter identified as Exhibit A, of plaintiff's petition for order to show cause a writ of mandamus indicating:

> "that because of certain factors existent in this transaction you would be required to pass a re-examination before it could be dismissed. This you failed to do and you ignored our letters with regard to the matter.
>
> The Commissioner has reviewed the file and has instructed us to inform you that we cannot grant your application for renewal until such time as you have passed this examination."

In the brief by Attorney General in opposition to issuance of order to show cause, the Commission cited as Exhibit 2 of said brief the inter-departmental communication of Mr. Harold G. Groehn, as the basis for ordering the re-examination. Said Exhibit reads as follows:

"December 14, 1950.

"To Howard N. Warner, Commissioner

From: Harold G. Groehn, Deputy Commissioner

No. 10639

MRS. NINA MCKEE

vs.

GABRIEL GLANTZ, DBA ALGER REALTY CO.

"A preliminary conference was held in this matter on November 9th; in Mr. Golm's report to us, he

recommended that a citation hearing be held. A date was set for this hearing, but on the date set for the hearing, the parties got together and adjusted their differences. (see receipt dated 12-3-48) when $200 of the $250 deposit was returned by the defendant, Gabriel Glantz, dba Alger Realty Co., to Nina McKee, complainant.

This case involved a return of a deposit which grew out of a place that had been condemned by the Department of Health, because of violation for lack of toilet facilities and non-acceptance by the landlord of the new owner of the rooming house business.

The defendant broker, who is also an attorney, was reluctant to return the deposit. I think that, in view of all of the facts and circumstances involved in this matter and the defendant's attitude, he should submit to a written re-examination, even though he adjusted the matter, and I so recommend.

I also recommend to you that upon successful passing of his written re-examination, this complaint be dismissed as "settled and dismissed".

Respectfully submitted,

(Signed) HAROLD G. GROEHN,
Deputy Commissioner,
Real Estate Division.

O. K. HMW 12-16-48."

In view of the fact that no hearing was held at which findings of fact could have been made, it follows that the only grounds stated for ordering the re-examination was plaintiff's "attitude" (Exhibit 2, brief of Attorney General), and the Commission's arbitrary right under the questioned statute, M. S. A. 19.798, to order re-examination (Exhibit B of plaintiff's original petition for writ of mandamus in Michigan Supreme Court):

"Michigan Corporation & Securities Commission

March 15, 1950

"Mr. Gabriel Glantz,
Attorney at Law,
880 Penobscot Bldg.,
Detroit 26, Michigan

Dear Sir:

Your letter of March 10, addressed to Commissioner Hart, has been referred to the writer for reply.

We wish to call your attention to the fact that Act 306, Sec. 8, provides as follows:

"the Commission shall have the authority to require at its discretion written examination or written re-examination of brokers and/or salesmen, and in these cases that passing grades, satisfactory to the commission shall be required as a condition precedent to reissuance of licenses to such brokers and/or salesmen."

"We have requested you on numerous occasions to submit to a written examination which is within the power and authority of this Commission to require, and you have not seen fit to comply with our requests. As set forth in this Commission's letter to you dated March 6, 1950, we are holding your application for renewal in abeyance for thirty days from March 6 and unless you appear at our Detroit office within that time and write the examination we will deny your application for renewal and order a refund of the fee paid for same.

Very truly yours,

(S.) HAROLD G. GROEHN,
Deputy Commissioner"

The question before this Court is whether the statute in question, M. S. A. 19.798, failing to set forth any guide or standard by which defendant Commission's discretion to order a re-examination can be tested, is constitutional.

M. S. A. 19.803 prescribes a hearing before the defendant Commission in the event of a complaint, to determine if there had been infractions of the real estate broker's law. It is possibly unnecessary to point out that the purpose of hearing is to make findings of fact and thereafter to apply the applicable law. Until there has been a hearing, there can be only charges. In the instant case, there was no hearing. Exhibit 2 of Attorney General's brief sets forth that:

> "An order was set for this hearing, but on the date set for the hearing, the parties got together and adjusted their differences."

Plaintiff in the instant action was not put to the test of refuting the charges, was denied the opportunity so to do. As no hearing was held, no charges were sustained and none proved. Notwithstanding that there was no hearing, this, with the approval of the defendant Commission and that consequently no penalties could be prescribed (the most severe of which is revocation of the license), nevertheless the defendant Commission, because of what it calls plaintiff's "attitude" has revoked plaintiff's license by refusing to renew the same unless the plaintiff submits to a re-examination. In Exhibit 2 of brief by Attorney General, defendant's agent Mr. Harold G. Groehn, sets forth many charges, none of which plaintiff was ever given the opportunity to refute at a proper hearing. Based on these unproven charges, together with the dissatisfaction of Mr. Groehn with plaintiff's "attitude", the defendant Commission had ordered him to submit to a lengthy examination or suffer the penalty of being refused the renewal of his broker's license.

Defendant Commission has made its position amply clear on page three of the brief of Attorney General by citing the questioned statute, M. S. A. 19.798, and in its letter of March 15th, 1950 to plaintiff, identified as Exhibit B of

plaintiff's petition for order to show cause and writ of mandamus. It clearly follows that the reason for ordering the re-examination is that defendant Commission has "the authority to require at its discretion written examination or written re-examination of brokers . . . ".

If this plaintiff's position is correct that no findings of fact could have been made inasmuch as the statutory hearing to determine facts was never held, it would seem to follow, as defendant Commission has set forth in its letter (Exhibit B of plaintiff's petition for writ of mandamus) to plaintiff, that plaintiff was ordered to take the examination because, and solely because the statute in question confers upon the defendant Commission the right to order him so to do.

Plaintiff submits the following cases for the Court's consideration, conspicuous among which are two Michigan cases, each of which sustains plaintiff's position that the Michigan Statute in question, M. S. A. 19.798, which authorizes the defendants actions, is invalid. *Yick Wo* v. *Peter Hopkins, Sheriff of the City and County of San Francisco,* 118 U. S. 356, 30 Law. Ed. 220.

Plaintiff will not submit the entire factual recital of the cases hereinafter cited but only pertinent portions of the opinion.

In the *Yick Wo* case, the court cites from the case of *Baltimore* v. *Radcke,* 49 Md. 217:

> "So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred

upon them authority to withhold their assent, without reason and without responsibility."

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men'. For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

"But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the City of Baltimore, to cease to do so, and by providing compulsory fines for every day's disobed-

ience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented."

In the matter of Andrew Frazee, 63 Michigan 396, a by-law of the City of Grand Rapids provided in part as follows:

"No person or persons . . . shall . . . parade . . . without having first obtained the consent of the mayor or common council of said city . . .".

"If the Legislature of the State had the power to subject the people of cities to the uncontrolled and arbitrary will of a common council, and, having such power, had clearly signified their purpose to do so, then it might perhaps be claimed, with some show of reason, that the city of Grand Rapids could do what it pleased under these grants of power. But the rules of legal construction allowed no such absurdity. It is not in the power of the Legislature to deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers. All charters, and all laws and regulations, to be valid for any purpose, must be capable of construction, and must be construed in conformity to constitutional principles, and in harmony with the general laws of the land; and any by-law which violates any of the recognized principles of legal and equal rights is necessarily void so far as it does do, and void entirely if it cannot be reasonably applied according to its terms."

"All by-laws made to regulate them must fix the conditions expressly and intelligibly, and not leave them to the caprice of any one."

"This by-law is unreasonable, because it suppresses what is in general perfectly lawful, and because it leaves the power of permitting or restraining proces-

sions, and their courses, to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent, legal provisions, operating generally and impartially."

Harrigan & Reid Company v. Burton, 224 Michigan 564.

"A yet more vital infirmity in this ordinance is its uncharted provisions prohibiting all corporations and persons, not excluding the owner, from installing in a dwelling any apparatus or system for keeping it warm without a license, followed by a permit, the requirements for which are not defined to the exclusion of arbitrary and discriminating official action in granting or refusing the same. Application blanks for permits provided for in section 4 are to be furnished to 'holders of contractor's licenses'. (6) and they only may install heating plants in dwellings; but no method of application, nor qualifications or standard of fitness for guidance of the licensing board are provided, by meeting which the applicant would be of right entitled to a license."

"In G. F. Redmond & Co. v. Michigan Securities Commission, 222 Mich. 1, this court recently pointed out that in the regulation of trades or occupations exercise of the police power—

'is capable of definite expression and must, if delegated to a commission or administrative board, define its purpose and means of attainment thereof, and do this in language leaving no wide administrative discretion, and no discretion at all of a legislative nature.'

Reasonable regulations and a uniform rule of action in its determination are essential to the validity of a municipal ordinance. It cannot be left to the arbitrary decision of an administrative officer or board."

Village of St. Johnsbury v. Aron, 103 Vt. 22; 151 A. 650.

The ordinance in this case left to the arbitrary discretion of village trustees the licensing of junk peddlers.

The ordinance was held invalid and the Vermont Supreme Court cited a plethora of cases from other jurisdictions.

151 A. 653.

> "The issue concerns the construction of the ordinance before us. Tested by the doctrine stated above, its invalidity is apparent. No rules are laid down for the guidance of the trustees; they are not required to consider the personal fitness of the applicant, the propriety and convenience of his location or premises, or any other thing in granting or withholding permission to carry on the business. No regulations are prescribed, the compliance with which will entitle the applicant to receive a license. The requirement of a fence does not so entitle him. Wehther or not the license is to be granted lies wholly in the discretion of the trustees and the discretion they may exercise arbitrarily and for personal and private reasons."

151 A. 654.

> "Gaither, 152 Md. 1, 136 A. 41, 45, 50 A. L. R. 620; Yick Wo v. Hopkins, supra. The phrase 'wholly within the discretion of said trustees' is equivalent to the grant of an uncontrolled or unlimited, or arbitrary discretion, and permits them capriciously to discriminate between the various applicants for a license. Such is our construction of the ordinance, and therefore we hold that it denies to the defendant the equal protection of the laws, as guaranteed to him by the Fourteenth Amendment of the United States Constitution."

The attention of the court is respectfully directed to the following case which, with the court's consent, will not be set forth:

City of Tulsa v. *Thomas*, 89 Okla. 188, 214 P. 1078.

Plaintiff, prior to defendant Commission's refusal to renew his broker's license, earned income as a real estate

broker. There are several thousand real estate brokers and salesmen in the State of Michigan, earning their livings from commissions derived from the sale of real property, each of whom can be forced to submit to a written re-examination at defendant Commission's discretion, or suffer the loss of his license for failure to do so, if defendant Commission's position is correct.

Plaintiff submits that the power of defendant Commission to order such examination, without guide or rule, and as it has in this case, because of plaintiff's "attitude", is contrary to the provisions of the Constitution of the United States hereinbefore cited, and that the Michigan statute in question, which authorizes such practices, is void and that, consequently, plaintiff, having complied with all valid provisions of the Michigan statutes relating to the issuance of a renewal of broker's license, defendant Commission should be ordered to issue plaintiff the license requested.

Respectfully submitted,

GABRIEL GLANTZ,
Propria persona.

APPENDIX A

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the eleventh day of September, in the year of our Lord one thousand nine hundred and fifty.

Present the Honorable Emerson R. Boyles, Chief Justice; Neil E. Reid, Walter H. North, John R. Dethmers, Henry M. Butzel, Leland W. Carr, George E. Bushnell, Edward M. Sharpe, Associate Justices.

44937½

GABRIEL GLANTZ, Plaintiff,

vs.

MICHIGAN CORPORATION AND SECURITIES COMMISSION, Defendant

In this cause a petition is filed for the allowance of an order to show cause, and a brief in opposition thereto having been filed by the Attorney General, and due consideration thereof having been had by the Court, It is ordered that the petition be and the same is hereby denied.

State of Michigan, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 14th day of September, in the year of our Lord one thousand nine hundred and fifty.

(S.) Jay Mertz, Clerk.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

No. 44937½

GABRIEL GLANTZ, Plaintiff

v.

MICHIGAN CORPORATION & SECURITIES COMMISSION, and PHILIP A. HART, Commissioner, Defendants

Statute in Question

Act 306, section 8, P. A. 1919 of the State of Michigan as amended by P. A. 1943, No. 57—also cited as 19.798 Michigan Statutes annotated.

License; application, procedure, contents; citizenship requirement; disqualification by conviction of embezzlement; requirements as to branch offices; commission's rule-making power; examinations and re-examinations; experience requirement, exception; fee. All applications for licenses shall be made in writing to the commission. Such applications shall also be accompanied by the recommendation of at least 2 citizens, real estate owners, who have owned real estate for a period of 1 year or more, in the county in which said applicant resides or had his place of business, which recommendation shall certify that the applicant bears a good reputation for honesty and fair dealing, and recommending that a license be granted to the applicant. Every applicant for a license shall furnish a sworn statement setting forth his present address, both of business and residence, the complete address of all former places where he may have resided or been engaged in business, or acted as a real estate salesman, for a period of 60 days or more, during the last 5 years, and the length of such residence, together with the name of at least 1 real estate owner in each of the said counties where he may have resided, engaged in business, or acted as a salesman. Every applicant for a broker's license shall also state the name of the person,

firm, partnership association, co-partnership or corporation, and the location of the place, or places, for which said license is desired, and set forth the period of time, if and, which said applicant has been engaged in the business, and shall be executed by such person, or by an officer or member thereof. A broker's license shall not be issued to any new applicant who is not a citizen of the United States nor to any person who has been convicted of embezzlement or misappropriation of funds. Every real estate broker shall maintain a place of business in this state. In case a real estate broker maintains more than 1 place of business within the state a duplicate license must be secured by such broker for each branch office so maintained:

Provided, That a broker shall be permitted to maintain, in the city which constitutes the situs of his main office, not more than 1 branch office for each 60,000 residents, according to the last federal decennial census or any subsequent federal decennial census:

Provided Further, That any branch office maintained in excess of 25 miles from the city limits in which such broker maintains his main office must be under the personal, direct supervision of an associate broker. Every applicant for a saleman's license shall in addition to the requirements of the first paragraph of this section, also set forth the period of time, if any, during which he has been engaged in the business, stating the name of his last employer and the name and place of business of the person, firm, partnership association, co-partnership or corporation then employing him or in whose employ he is to enter.

The application shall be accompanied by a written statement by the broker in whose employ he is to enter stating that in his opinion the applicant is honest, truthful and of good reputation, and recommending that the license be granted to the applicant.

Every applicant for a saleman's license shall be a citizen of the United States.

The commission shall have the right to prescribe the form

of application for all licenses. The commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, business experience, competence and reputation of any applicant for a real estate broker's or salesman's license or of any of the officers or members of any such applicant, prior to the issuance of any such license. The commission is expressly vested with power and authority to make, prescribe and enforce, after having been approved by the attorney general and recorded by the secretary of state, as required under Act No. 88 of the Public Acts of 1943, any and all such rules and regulations connected with the application, for any license and the issuing of the same as shall be deemed necessary to administer and enforce the provisions of this act, and the issuance or refusal of a license shall be discretionary with the commission.

The commission shall also require each applicant for broker's or salesman's license to pass an examination establishing in a manner satisfactory to the commission, that the applicant has a fair knowledge of the English language, including reading, writing, spelling, and elementary arithmetic, a satisfactory understanding of the fundamentals of real estate practice and of the laws and principles of real estate conveyancing, deeds, mortgages, land contracts, leases, the obligations of a broker to the public and his principal, and the provisions of the Michigan statutes defining, regulating and licensing real estate brokers and salesmen: Provided, however, That the commission shall have the authority to require at its discretion written examination re-examination of brokers and salesmen, and in these cases that passing grades, satisfactory to the commission shall be required as a condition precedent to reissuance of licenses to such brokers and salesmen. The commission shall also require proof that each applicant for a broker's license has been engaged in the real estate business for a period of not less than 3 years, at least 2 of which shall have been as a salesman licensed hereunder, or its equivalent in

relevant, related experience in the discretion of the commission: Provided, That brokers heretofore licensed heretofore licensed hereunder shall not be required to meet said 3 year requirement. An examination fee of $3.00 shall be collected from each applicant to defray the expenses of holding such examination.

(2383)

FILED
JAN 17 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 503

GABRIEL GLANTZ,

Appellant,

vs.

MICHIGAN CORPORATION & SECURITIES COMMISSION and PHILIP A. HART, Commissioner

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APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

FRANK G. MILLARD,
Attorney General of Michigan,
EDMUND E. SHEPHERD,
Solicitor General of Michigan,
DANIEL J. O'HARA,
Assistant Attorney General of Michigan,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 503

GABRIEL GLANTZ,

Appellant,

v.

MICHIGAN CORPORATION AND SECURITIES COMMISSION and PHILIP A. HART,

Defendants-Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT OF DEFENDANTS-APPELLEES DISCLOSING MATTERS AND GROUNDS MAKING AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The defendants-appellees, believing that the matters set forth below will demonstrate a lack of substance in the Federal questions raised by this appeal, file this, their statement disclosing matters and grounds making against juris-

diction and pursuant to Supreme Court Rule 12, § 3, they respectfully move the Court to dismiss the appeal or affirm the judgment of the Court below, on the grounds hereinafter set forth.

1

Summary of Provisions of the Michigan Statute, the Validity of Which Is Here Drawn in Question

Appellant asks this Court to declare invalid an Act of the Michigan legislature which *inter alia* defines, regulates and licenses real estate brokers and others,[1] upon review of an order of the Michigan Supreme Court denying a writ of mandamus to compel the State administrative agency charged with its enforcement, to issue a renewal license.[2]

The first section of the statute makes it unlawful for any person to engage in the business or capacity of a real estate broker "without first obtaining a license under the provisions of this act," and Section 4 delegates to the Michigan Corporation and Securities Commission, appellee, the duty of enforcement of this legislative measure.

Sec. 8 [set forth in Appendix "A"] upon which appellant's attack is directed for the purpose of invalidating the entire statute, provides the manner in which applications for such licenses shall be made, prescribes the qualifications of applicants therefor, and requires each to pass an examination

> "establishing in a manner satisfactory to the commission, that the applicant has a fair knowledge of the English language, including reading, writing, spelling

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[1] The relevant provisions of the statute, Mich. Pub. Acts 1919, No. 306, §§ 8, 11, 13 and 14, as amended, are set forth in Appendix "A" attached to this statement.

[2] Thus appellant seeks to retain the benefits of the Act while attacking the constitutional validity of one of its important provisions, Fahey v. Mallonee, 332 U.S. 245, 255.

and elementary arithmetic, a satisfactory understanding of the fundamentals of real estate practice and of the laws and principles of real estate practice and of the laws and principles of real estate conveyancing, deeds, mortgages, . . . the obligations of a broker to the public and his principal, and the provisions of the Michigan statutes defining, regulating and licensing real estate brokers and salesmen: Provided, however, That the commission shall have the authority to require at its discretion written examination or written re-examination of brokers . . ., and in these cases that passing grades, satisfactory to the commission shall be required as a condition precedent to reissuance of licenses to such brokers . . ."

Sec. 11 provides that every license shall expire on the 31st day of December 1943, and on the 31st day of December of every third year thereafter.[3] "In the absence of any reason or condition which might warrant the refusal of the granting of a license, the commission shall issue a new license for each ensuing 3-year term upon receipt of application and fee therefor."[4]

Sec. 13 provides that the Commission may upon its own motion "and shall upon the verified complaint in writing of any person, investigate the actions of any real estate broker . . . and shall have the power to suspend or revoke any license . . . at any time where the licensee . . . is deemed to be guilty" of any of 10 specified acts of misconduct including "(f) failure to account for or to remit for any moneys coming into his possession which belong to others."[5]

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[3] Appellant's license was issued on the 19th day of February 1948 and it expired pursuant to this section on the 31st day of December 1949.

[4] In the court below appellant sought mandamus to compel the commission to issue such a renewal license, at the same time attacking the constitutionality of the statute.

[5] It was of such misconduct that appellant was accused.

Before such an order can lawfully be made, however, the Commission is required by § 14 of the act to give the licensee at least 10 days notice in writing of a hearing on such charges, of the nature thereof, "and shall afford said licensee an opportunity to be heard in person or by counsel in reference thereto." Findings of fact made by the Commission, acting within its powers, "shall in the absence of fraud be conclusive, but the supreme court shall have the power to review questions of law involved in any decision or determination of the commission: Provided, That application is made by the aggrieved party within thirty [30] days after such determination, by certiorari mandamus or any other method permissible under the rules and practice of said court or the laws of this state, and to make such further orders in respect thereto as justice may require."

The facts may be quickly summarized in chronological order as follows:

Feb. 19, 1948, after passing the examination prescribed by § 8 of the statute, appellant was granted a real estate broker's license which was due to expire on the 31st day of December 1949.

Nov. 15, 1948, the Commission issued a citation commanding the appellant to appear before them on the 6th day of December to show cause why his license should not be revoked or suspended upon *complaint of one Nina McKee, who* charged he had failed to account for $200 coming into his possession which belonged to her, being part of a deposit retained by him, and given to him by her, in the purchase of a rooming house located in the city of Detroit, "all of which conduct constitutes dishonest and unfair dealing." (Exhibit 1 attached to brief filed by defendants-appellees in the court below.)

Dec. 6, 1948, the date set for hearing, "the parties got together and adjusted their differences" when $200 of the $250 deposit was returned by appellant to Nina McKee. The Deputy Commissioner reported (Exhibit 2, attached to brief of defendants-appellees in court below) and recommended to the Commission as follows:

> "The defendant broker, who is also an attorney, was reluctant to return the deposit. I think that, in view of all the facts and circumstances involved in this matter and the defendant's attitude, he should submit to a written re-examination, even though he adjusted the matter, and I so recommend.
>
> "I also recommend to you that upon successful passing of his written re-examination, this complaint be dismissed as 'settled and dismissed.'"

Dec. 20, 1948, appellant was notified (Exhibit 3 attached to our brief in court below) of such recommendation and to "please arrange to go to our Detroit office at your earliest convenience and write this re-examination. No fee is charged, and you should allow yourself at least two hours in which to complete the work." All of which was to be done "before this matter is dismissed."

Appellant did not avail himself of the opportunity afforded to take the re-examination, the matter of the complaint of Nina McKee was not dismissed, and nothing whatever was done by appellant until one year later when in December 1949 he applied for renewal of his expiring license, but his request was refused.

July 25, 1950, appellant filed in the Court below his petition for an order directed to the Commission "to show cause why a writ of mandamus should not issue . . . directing said commission . . . to issue a real estate broker's license to petitioner, upon payment to said commission by petitioner of the license fee of $15."

In such original petition appellant alleged that the act was invalid in that it violated the equal protection and due process clauses of the Michigan State Constitution, Article II, §§ 1 and 16. The Constitution of the United States was not cited nor did the appellant raise Federal questions. And such questions were not raised in appellant's supporting brief.

The Attorney General filed a brief opposing, in which of course no Federal questions were discussed; appellant filed a reply brief in which he failed to cite or mention the Federal Constitution, or to discuss Federal questions, though at the same time he did file an amendment to his petition for mandamus, in which for the first time he cited the Fourteenth Amendment.

The petition for mandamus was denied by the Court below on the 11th day of September 1950, without opinion or comment.

2

Reasons and Grounds for Dismissal or Affirmance

1. It does not affirmatively appear that decision of the Federal question was necessary to the determination of the cause; that it was actually decided or that the judgment as rendered could not have been given without deciding it.[6]

2. Since in Michigan mandamus is a discretionary writ,[7] relief was probably denied on the ground that appellant was in court with unclean hands, and if the Federal ques-

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[6] Southwestern Bell Telephone Co. v. Oklahoma, 303 U.S. 206, 212; Alabama State Fed. of Labor v. McAdory, 325 U.S. 450.

[7] Such a writ lies only to enforce performance of a clear legal right or ministerial duty, Home Insulation Co. v. State Board of Tax Administration, 298 Mich. 697, and not so long as the right or duty is disputed or doubtful, McLeod v. State Bd. of Canvassers, 304 Mich. 120.

tion actually came to the attention of the Court,[8] it was quite likely ignored because the appellant sought to retain the benefits of the act (the issuance of a license thereunder) while attacking the constitutional validity of one of its important provisions, *Fahey* v. *Mallonee*, 332 U. S. 245, 255, and cases cited.[9]

3. Moreover the appellant was premature in attacking the statute as unconstitutional, for he had not yet exhausted his administrative remedies by taking the re-examination ordered by the Commission, and the complaint made against him had not yet been heard or otherwise disposed of. And it cannot be said with that degree of certainty essential to jurisdiction, that this Court is called upon by § 1257, Title 28, U. S. C. as revised, to review a final judgment or decree rendered by the highest court of Michigan on the questions presented.[10]

4. The alleged Federal constitutional questions lack substance and the appeal therefore should be dismissed.[11]

(a) The statute extends to all persons who can qualify under its reasonable terms, the privilege of license.

(b) The standards prescribed for examination are reasonable, a fair knowledge of the English language, including reading, writing, spelling and elementary arithmetic, a satisfactory understanding of the fundamentals of real estate practice and of the laws and

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[8] The federal question was not briefed, and the Constitution of the United States was not cited until an amendment to the petition was filed after the commission had presented its brief.

[9] It should be noted that the entire act was challenged as invalid. If the statute is unconstitutional it no longer exists and since it no longer functions as Michigan law, it can prescribe no duties to be performed by the commission.

[10] Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62.

[11] Milheim v. Moffatt Tunnel District, 262 U.S. 710.

principles of real estate conveyancing, the obligations of a broker to the public and his principal (§ 8).

(c) If it be reasonable to require such an examination as a condition precedent to obtaining a license in the first instance, why should it not be required in the discretion of the Commission upon renewal of a license. No one has ever suggested that a requirement of re-examination of drivers of motor vehicles at stated intervals would be invalid.

(d) Furthermore, the statute provides for due notice of the nature of complaints lodged against a licensee, prescribes reasonable grounds for revocation of a license, requires written notice of hearing, affords reasonable opportunity to be heard, and grants a judicial review.

Wherefore, defendants-appellees respectfully submit this statement disclosing the foregoing matters and grounds making against the jurisdiction of this Court, and in that connection, their motion to dismiss or affirm.

Respectfully submitted,

FRANK G. MILLARD,
Attorney General of the State of Michigan,
EDMUND E. SHEPHERD,
Solicitor General of the State of Michigan,
DANIEL J. O'HARA,
Assistant Attorney General.

APPENDIX "A"

Copy of relevant parts of statute involved

Michigan Public Acts 1919, No. 306, §§ 8, 11, 13 and 14; Mich. Comp. Laws 1948, §§ 451.208, 451.211, 451.213, 451.214; Mich. Stat. Ann. [Henderson] 1949 Cum. Supp. §§ 19.798, 19.801, 19.803, and in original volume, § 19.804.

"Sec. 8. All applications for licenses shall be made in writing to the commission. Such applications shall also be accompanied by the recommendation of at least 2 citizens, real estate owners, who have owned real estate for a period of 1 year or more, in the county in which said applicant resides or had his place of business, which recommendation shall certify that the applicant bears a good reputation for honesty and fair dealing, and recommending that a license be granted to the applicant. Every applicant for a license shall furnish a sworn statement setting forth his present address, both of business and residence, the complete address of all former places where he may have resided or been engaged in business, or acted as a real estate salesman, for a period of 60 days or more, during the last 5 years, and the length of such residence, together with the name of at least 1 real estate owner in each of the said counties where he may have resided, engaged in business, or acted as a salesman. Every applicant for a broker's license shall also state the name of the person, firm, partnership association, copartnership or corporation, and the location of the place, or places, for which said license is desired, and set forth the period of time, if any, which said applicant has been engaged in the business, and shall be executed by such person, or by an officer or member thereof. A broker's license shall not be issued to any new applicant who is not a citizen of the United States nor to any person who has been convicted of embezzlement or misappropriation of funds. Every real estate broker shall maintain a place of business in this state. In case a real estate broker maintains more than 1 place of business within the state a duplicate license must be secured by such broker

for each branch office so maintained: *Provided,* That a broker shall be permitted to maintain, in the city which constitutes the situs of his main office, not more than 1 branch office for each 60,000 residents, according to the last federal decennial census or any subsequent federal decennial census: *Provided further,* That any branch office maintained in excess of 25 miles from the city limits in which such broker maintains his main office must be under the personal direct supervision of an associate broker. Every applicant for a saleman's license shall, in addition to the requirements of the first paragraph of this section, also set forth the period of time, if any, during which he has been engaged in the business, stating the name of his last employer and the name and place of business of the person, firm, partnership association, copartnership or corporation then employing him or in whose employ he is to enter. The application shall be accompanied by a written statement by the broker in whose employ he is to enter stating that in his opinion the applicant is honest, truthful and of good reputation, and recommending that the license be granted to the applicant. Every applicant for a salesman's license shall be a citizen of the United States.

"The commission shall have the right to prescribe the form of application for all licenses. The commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, business experience, competence and reputation of any applicant for a real estate broker's or salesman's license or of any of the officers or members of any such applicant, prior to the issuance of any such license. The commission is expressly vested with the power and authority to make, prescribe and enforce, after having been approved by the attorney general and recorded by the secretary of state, as required under Act No. 88 of the Public Acts of 1943, any and all such rules and regulations connected with the application, for any license, and the issuing of the same as shall be deemed necessary to administer and enforce the provisions of this act, and the issuance or refusal of a license shall be discretionary with the commission. The commission shall also require each

applicant for broker's or salesman's license to pass an examination establishing, in a manner satisfactory to the commission, that the applicant has a fair knowledge of the English language, including reading, writing, spelling and elementary arithmetic, as atisfactory understanding of the fundamentals of real estate practice and of the laws and principles of real estate conveyancing, deeds, mortgages, land contracts, leases, the obligations of a broker to the public and his principal, and the provisions of the Michigan statutes defining, regulating and licensing real estate brokers and salesmen: *Provided, however,* That the commission shall have the authority to require at its discretion written examination or written re-examination of brokers and/or salesmen, and in these cases that passing grades, satisfactory to the commission shall be required as a condition precedent to reissuance of licenses to such brokers and/or salesmen. The commission shall also require proof that each applicant for a broker's license has been engaged in the real estate business for a period of not less than 3 years, at least 2 of which shall has [have] been as a salesman licensed hereunder, or its equivalent in relevant, related experience in the discretion of the commission: *Provided,* That brokers heretofore licensed hereunder shall not be required to meet said 3 year requirement. An examination fee of $3.00 shall be collected from each applicant to defray the expenses of holding such examination." [12]

"Sec. 11. The fee for each original real estate broker's license shall be $20.00 and a renewal shall be $15.00. The fee for each branch office license shall be $10.00 and a renewal shall be $10.00. The fee for each original real estate salesman's license shall be $4.00 and a renewal shall be $3.00. Each real estate broker's license which may be granted to an individual shall entitle such individual to perform all of the acts contemplated by this act with respect to a real estate broker. Each real estate broker's license granted to any firm, partnership association, copartnership or corporation consisting of more than 1 per-

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[12] Mich. Comp. Laws 1948, § 451.208, Mich. Stat. Ann. [Henderson] 1949 Cum. Supp. § 19.798. This is the section here challenged.

son shall entitle such real estate broker to designate which of its officers or members are active, who upon compliance with the terms of this act shall, upon the payment of a fee of $3.00 each, upon issuance of said broker's license, be entitled to perform all of the acts of a real estate broker contemplated by this act: *Provided,* That a broker's license granted to any firm, partnership association, copartnership or corporation shall not be transferable. The officers and members so designated, however, must make application for an associate broker's license, which application shall accompany the application of the real estate broker, and be filed with the commission at the same time as the application of the real estate broker for a license. Every active officer or member of a firm, partnership association, copartnership or corporation shall obtain an associate broker's license, as hereinbefore provided: *Provided,* That the license of any such officer or member who ceases to be connected with such firm, partnership association, copartnership or corporation shall be automatically suspended and shall also be automatically suspended upon the revocation of the broker's license of such firm, partnership association, copartnership or corporation: *Provided further,* That in case any such officer or member shall become connected with any firm, partnership association, copartnership or corporation, after the issuance of a broker's license thereto, he shall as a prerequisite to becoming an active officer or member secure an associate broker's license as hereinbefore provided. Every application for a license under the provisions of this act shall be accompanied by the license fee herein prescribed and every license shall expire on the 31st day of December 1943, and on the 31st day of December of every third year thereafter. In the absence of any reason or condition which might warrant the refusal of the granting of a license, the commission shall issue a new license for each ensuing 3 year term upon receipt of application and fee therefor. The revocation of a broker's license shall automatically suspend every real estate salesman's license granted to any person by virtue of his employment by the broker whose license has been revoked, pending a change of employer and the issuance of

a new license. Such new license shall be issued without charge, if granted during the same 3 year term in which original license was granted." [13]

"Sec. 13. The commission may upon its own motion and shall upon the verified complaint in writing of any person, investigate the actions of any real estate broker or real estate salesman or any person who shall assume to act in either such capacity within this state and shall have the power to suspend or revoke any license issued under the provisions of this act at any time where the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of:

(a) Making any substantial misrepresentation, or

(b) Making any false promises of a character likely to influence, persuade or induce, or

(c) Pursuing a continued and flagrant course of misrepresentation or the making of false promises through agents or salesmen or advertising or otherwise, or

(d) Acting for more than 1 party in a transaction without the knowledge of all parties thereto, or

(e) Representing or attempting to represent a real estate broker other than the employer, without the express knowledge and consent of the employer, or

(f) Failure to account for or to remit for any moneys coming into his possession which belong to others, or

(g) Changing his business location without notification to the commission.

(h) Failure of a broker to return salesman's license within 5 days as provided in section 10.

(i) Paying a commission or valuable consideration to any person not licensed under the provisions of this act.

(j) Any other conduct whether of the same or a different character than hereinbefore specified, which constitutes dishonest or unfair dealing.

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[13] Mich. Comp. Laws 1948, § 451.211; Mich. Stat. Ann. (Henderson) 1949 Cum. Supp. § 19.801.

This act shall not be construed to relieve any person from civil liability or criminal prosecution under the general laws of this state." [14]

"Sec. 14. The commission shall, before suspending or revoking any license and at least ten (10) days prior to the date set forth the hearing, notify in writing the holder of such license of any charges made and shall afford said licensee an opportunity to be heard in person or by counsel in reference thereto. Such written notice may be served by delivery of the same personally to the licensee or by mailing same by registered mail to the last known business address of such licensee. If said licensee be a salesman, the commission shall also notify the broker employing him of the charges, by mailing notice by registered mail to the broker's last known business address. The hearing on such charges shall be at such time and place as the commission shall prescribe. The commission shall have the power to subpoena and bring before it any person in this state or to take the testimony of any such person by deposition in the same manner as prescribed by law in judicial procedure in courts of this state in civil cases, with the same fees and mileage as provided by law for criminal cases. If the commission shall determine that any licensee is guilty of a violation of any of the provisions of this act, said license shall be suspended or revoked. The findings of fact made by the commission, acting within its powers, shall in the absence of fraud be conclusive, but the supreme court shall have the power to review questions of law involved in any final decision or determination of the commission: *Provided*, That application is made by the aggrieved party within thirty (30) days after such determination, by certiorari, mandamus or by any other method permissible under the rules and practice of said court or the laws of this state, and to make such further orders in respect thereto as justice may require." [15]

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[14] Mich. Comp. Laws 1948, § 451.213; Mich. Stat. Ann. (Henderson) 1949 Cum. Supp. § 19.803.

[15] Mich. Comp. Laws 1948, § 451.214; Mich. Stat. (Henderson), original Volume, § 19.804.

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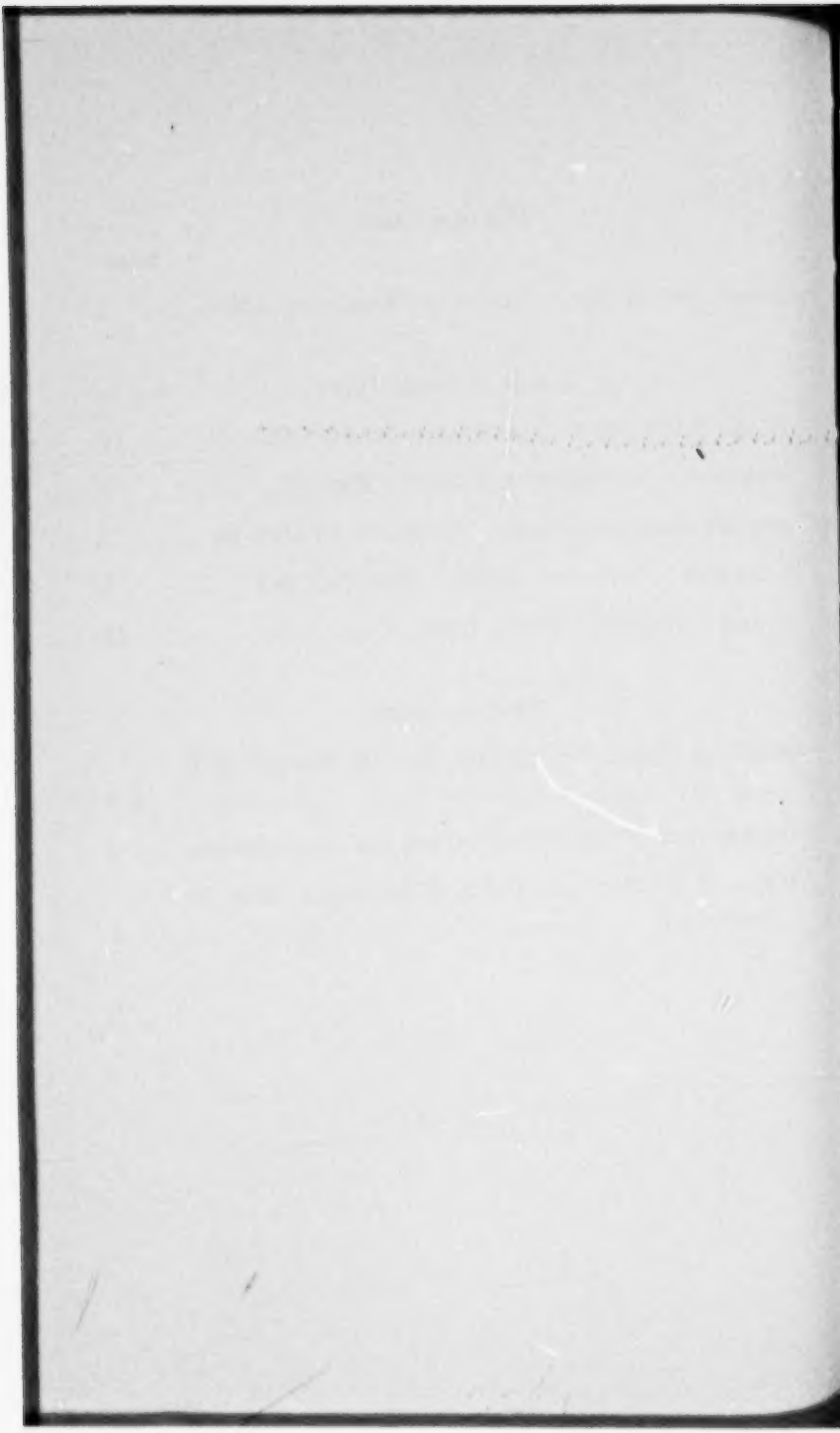

Supreme Court of the United States

October Term, 1950

No. 503

GABRIEL GLANTZ,

Appellant,

vs.

MICHIGAN CORPORATION & SECURITIES COMMISSION AND PHILIP A. HART, COMMISSIONER

APPPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

Plaintiff-appellant moves that this honorable Court deny appellee's Motion to Dismiss or Affirm for the reasons hereinafter set forth:

Appellant requested the Supreme Court of the State of Michigan to issue an order directed to defendant Corporation & Securities Commission to show cause why it

should not issue a real estate broker's license to appellant. Plaintiff set forth in said original petition that he had complied with all valid provisions of the real estate brokers' law and that the defendant commission had refused to issue a broker's license to him in 1950 because of his failure to comply with their demand that he submit to a re-examination. Defendant Commission's position is that it had the authority to order the re-examination, notwithstanding that there had been no hearing and no facts proved, by virtue of the following portion of Section 8 of the Michigan Broker's Law:

> "The commission shall have the authority to require at its discretion written examination or written re-examination of brokers and/or salesmen, and in these cases that passing grades, satisfactory to the commission shall be required as a condition precedent to reissuance of licenses to such brokers and/or salesmen."

On pages 3 and 4 of appellee's Motion to Dismiss or Affirm the defendant Commission comments on sections 13 and 14 of the Act as follows:

> "*Sec. 13* provides that the commission may upon its own motion 'and shall upon the verified complaint in writing of any person, investigate the actions of any real estate broker . . . and shall have the power to suspend or revoke any license . . . at any time where the license . . . is deemed to be guilty' of any of 10 specified acts of misconduct including '(f) failure to account for or to remit for any moneys coming into his possession which belong to others.
>
> 'Before such an order can lawfully be made, however, the commission is required by Sec. 14 of the act to give the licensee at least 10 days notice

> in writing of a hearing on such charges, of the nature thereof, 'and shall afford said licensee an opportunity to be heard in person or by counsel in reference thereto.' Findings of fact made by the commission, acting within its powers, shall in the absence of fraud be conclusive, but the Supreme Court shall have the power to review questions of law involved in any decision or determination of the commission: Provided, That application is made by the aggrieved party within thirty (30) days after such determination, by certiorari, mandamus or any other method permissible under the rules and practice of said court or the laws of this state, and to make such further orders in respect thereto as justice may require",

indicating, of course, that a license can be revoked only pursuant to these actions, after a hearing.

In the 1st and 2nd paragraphs on page 6 of its Motion to Dismiss or Affirm defendant Commission states that there was no allegation in plaintiff's original petition, that the Act in question violated the Federal Constitution and that the federal question was raised only after defendant Commission had filed its brief opposing the original Petition for Writ of Mandamus. Although the above recitation of facts is true, it should be pointed out that the Federal question was raised in time. The original application for the Writ of Mandamus was filed in the Michigan Supreme Court on JULY 25TH, 1950. Defendant Commission's brief was prepared and filed the following day, JULY 26TH, 1950. The next day, JULY 27TH, 1950, plaintiff prepared and mailed away his Reply brief and the Amendment to the Original Petition in which the plaintiff alleges that the Act violates the Federal Constitution. This Amendment to Plaintiff's Original Petition,

having been filed within fifteen days of the time that defendant's Answer was received, was properly filed as a matter of right, as is indicated on page 3 of plaintiff's jurisdictional statement. Michigan Court Rule 26, Section 1, reads as follows:

> "Plaintiff may at any time before answer is put in, or within fifteen days threafter, amend his declaration or bill of complaint, and defendant within fifteen days after his answer is put in may amend same, without leave of court and without costs."

On page 6 of its Motion to Dismiss or Affirm under headings 1 and 2, defendant Commission discusses the following matters:

Under said heading 1, defendant Commission states that it does not affirmatively appear that decision of the federal question was necessary to the determination of the cause. In view of the fact that the federal question was properly and clearly raised and that as a matter of fact, appellant's contention is that the Michigan Statute which allows the defendant Commission to order re-examinations at its discretion violates the fourteenth amendment of the Federal Constitution, and further, inasmuch as appellant has conceded that if Section 8 of the Act which permits the Commission to order re-examinations at its discretion is valid, appellant has no cause of action, it would seem to clearly follow that the federal question is the only important question in this cause and that this cause cannot properly be decided without a consideration of the federal question.

On page 6 of its Motion to Dismiss or Affirm under heading 2, defendant Commission states that in Michigan mandamus is a discretionary writ. Defendant's position is not correct. In the case of *Hamilton* v. *Secretary of State*, 212 Mich. 31, on page 42, the Michigan Supreme Court says:

> "But this court has said in no uncertain terms that it has no discretion when called upon to compel a public officer to perform a duty imposed on him by law.
>
> "A mandamus in a case where the duty of a public officer is absolute and specific * * * is no more matter of discretion than any other remedy."
>
> *Auditor General* v. *County Treasurer*, 73 Mich. 28, 32.

In the case of *Leininger* v. *Secretary of State*, 316 Mich. 644, the same question was again raised, i.e., whether mandamus is in all cases a discretionary writ. The Court answered said question as follows:

> "It is urged by defendants that mandamus is not a matter of right, but one of grace, which, in this instance, should be denied because plaintiffs do not show that they are in a class to be affected by the proposed law and because of the shortness of the time in which this Court is called upon to render decision in view of the imminent deadline for printing ballots for the next general election. In answer to a like contention in the Hamilton Case, supra (212 Mich. 31), this Court said:
>
> " 'But this Court has said in no uncertain terms that it has no discretion when called upon to compel a public officer to perform a duty imposed on him by law.

> "'A mandamus in a case where the duty of a public officer is absolute and specific * * * is no more matter of discretion than any other remedy.' Auditor General v. Tuscola County Treasurer, 73 Mich. 28, 32."

It would thus appear that in the instant case where the constitutionality of the Act on which defendant grounds its position is questioned, mandamus is a writ of right rather than of discretion.

On page 6 of its Motion to Dismiss or Affirm under sub heading 2, defendant questions "if the federal question actually came to the attention of the Court". As hereinbefore indicated the federal question was timely raised by a separate and distinct pleading relating only to the federal question which pleading was properly filed within the time allowed by Michigan Court rule (Michigan Court Rule 26, Section 1).

Further under said sub heading 2 on page 6 of defendant's Motion to Dismiss or Affirm defendant states that, relief was probably denied on the grounds that appellant was in Court with unclean hands. As pointed out in appellant's jurisdictional statement on page 9:

> "Plaintiff in the instant action was not put to the test of refuting the charges, was denied the opportunity so to do. As no hearing was held no charges were sustained and none proved."

In view of the fact that the hearing was abandoned and that consequently no findings of fact of any nature could have been made, it is difficult to comprehend defendant's position that appellant was in Court with unclean hands.

And finally under sub heading 2 on page 7 of defendant's Motion to Dismiss or Affirm, defendant sets forth the proposition that appellant sought to retain the benefits of the Act (issuance of a license thereunder) while attacking the constitutional validity of one of its most important provisions. In support of its position defendant cites the case of *Fahey* v. *Mallonee*. In the *Fahey* case, the question is whether or not constitutional objections to the Federal Act authorizing and regulating Savings and Loan Associations can be raised by the Savings and Loan Associations which "are created, insured and aided by the Federal Government", 332 U. S. 250, 91 Law. Ed. 2037. In its opinion in the *Fahey* case the Court on page 255 cites the case of *United States* v. *San Francisco*, 310 U. S. 16, 29, 84 Law Ed. 1050, 1059, in which case the plaintiff was granted valuable rights in government owned lands and raised objections ot rules and regulations concerning the disposition of power obtained from resources obtained from said government owned lands. In the above cited federal cases, the Legislature gratuitously established and made available benefits which were not obtainable before the enactment of the Act. Can it be said that the cited federal case of *Fahey* v. *Mallonee* is analogous to the instant case in which the only effect of the Act is to regulate an existing profession? Does defendant seriously contend that because the Michigan Act makes it mandatory for plaintiff to obtain a license to sell real estate, that he is thereby estopped to question the validity of the regulatory statute?

On page 7 of defendant's Motion to Dismiss or Affirm under sub heading 3, defendant contends that "appellant was premature in attacking the statute as unconstitutional

for he had not yet exhausted his administrative remedies by taking the re-examination ordered by the Commission." Defendant seems to be advancing the proposition that plaintiff must first take the re-examination which was ordered by defendant Commission notwithstanding his position that said order is unconstitutional and void, and the ordering of which re-examination is the entire crux of this suit, before he can maintain this suit. Plaintiff could not have taken the examination and continued to insist that the order was void for had he taken the examination, the matter of the propriety of defendant Commission's order would have been a moot question.

The defendant says further under said sub heading 3 that appellant was premature in attacking the statute as unconstitutional because "the complaint made against him had not yet been heard or otherwise disposed of". The complaint under sections 13 and 14 of the Michigan Statute must be prosecuted by the defendant Commission and it was not heard and disposed of because defendant Commission abandoned said hearing. Does defendant now maintain that because the defendant Commission abandoned the hearing that the plaintiff cannot proceed in this action unless said hearing be ordered and concluded? Defendant Commission had the opportunity to order a hearing and to prosecute the same under sections 13 and 14 of the Michigan Statute. However, having failed to prosecute said hearing, which only the Commission can do, can the Commission now be heard to say that plaintiff is premature in this suit because no hearing was held?

On page 8 under sub heading 4 of its Motion to Dismiss or Affirm, defendant states in paragraph (c), "No one has

ever suggested that a requirement of re-examination of drivers of motor vehicles at stated intervals would be invalid." Plaintiff is willing to concede that a requirement of re-exaimnation of a licensee in any field of endeavor "at stated intervals" would be valid. However, the admission of said proposition in no way assists defendant in its contention that an order to take a re-examination at the Commission's "discretion" is proper. It would seem to be unnecessary to point out the utter lack of analogy between the two propositions.

Under sub paragraph (d) of said paragraph 4, defendant Commission summarizes the provisions of sections 13 and 14 of the Real Estate Broker's Law, relating to a hearing, which as this plaintiff has pointed out on several occasions before was not availed of by the Commission in the instant case. As a matter of fact, it would appear that defendant Commission attempted to impose a penalty without following the procedure set forth in sections 13 and 14 of the Real Estate Brokers Act, i.e., the hearing which the Commission set for December 6th, 1948, pursuant to sections 13 and 14 of the Brokers Act, was abandoned by the Commission. Had this hearing been held, and had defendant Commission found that plaintiff had committed infractions of the law, it could have, pursuant to the provisions of section 14 of the Act, "suspended or revoked" plaintiff's license. However, since the hearing was not held, it follows that the penalties prescribed in section 14 could not be imposed, and, as a matter of fact, that no penalties could be imposed inasmuch as none are prescribed without a hearing.

However, the fact that no penalties could be imposed under sections 13 and 14 was no deterrent to defendant

Commission. A complaint had been made against plaintiff, and defendant Commission was dissatisfied with plaintiff's "attitude" (Letter by Herold G. Groehn, p. 7, Appellant's Statement as to Jurisdiction). Thereupon, two weeks after the hearing had been abandoned, defendant Commission ordered plaintiff to take a re-examination pursuant to section 8 of the Brokers Act, which permits the Commission to order a re-examination "at its discretion". When plaintiff protested against the order of re-examination, defendant Commission informed him by letter (Letter dated March 5, 1950, addressed to Gabriel Glantz, p. 8, Appellant's Statement as to Jurisdiction), that Section 8 of the Brokers Act authorized the Commission "to require at its discretion, written examination or written re-examination of brokers", and further that it "is within the power and authority" of the Commission to order a re-examination, and that his license would not be renewed until he submitted to said re-examination.

A review of the above events would seem to lead to the conclusion that defendant Commission would impost the penalty of requiring plaintiff to submit to the re-examination by virtue of section 8 of the Act, which permits the Commission to order re-examinations "at its discretion", notwithstanding that no hearing had been held. The imposition of a penalty without benefit of a hearing obviously violated the 14th Amendment of the Federal Constitution.

Defendant Commission has, in this instance, chosen to take advantage of its power, under section 8 of the Brokers Act, to order a re-examination for the purpose of imposing a penalty without first giving plaintiff the be-

of a hearing. Further, since there is no rule nor guide by which the Commission's authority to order re-examinations can be tested, what is to prevent the Commission from ordering future re-examinations for fancied infractions of the law or even for reasons of personal animus? As stated in the Michigan case, *"In the Matter of Andrew Frazee,"* 63 Mich. 396, on page 407, when an ordinance of the City of Grand Rapids was held to be void and unconstitutional, which permitted parades only with the consent of the mayor and the Common Council and prescribed no rules to guide the mayor and the council:

> "When men in authority have arbitrary power, there can be no liberty",

and, on page 409:

> "It is probable that no actual abuse has often been committed by the local court in fixing penalties, but, when the law permits, such things are always possible, and, in cases exciting prejudice, are not unlikely to happen."

Therefore, for the reasons hereinbefore stated and for the reasons stated in *Spann* v. *Gaither,* 152 Md. 1, 136 A. 41, 45:

> "The phrase 'wholly within the discretion of said trustees" is equivalent to the grant of an uncontrolled or unlimited, or arbitrary discretion, and permits them capriciously to discriminate between the various applicants for a license. Such is our construction of the ordinance, and therefore we hold that it denies to the defendant the equal protection of the laws, as guaranteed to him by the Fourteenth Amendment of the United States Constitution",

plaintiff submits that the questioned portion of section 8 of the Michigan Real Estate Brokers Law which permits the defendant Commission to order a re-examination "at its discretion" is invalid and in contravention of the Fourteenth Amendment of the Federal Constitution, and that the Michigan Supreme Court should have ordered the defendant Commission to issue plaintiff a Real Estate Broker's license, plaintiff having complied with all valid provisions of the Real Estate Brokers Act.

GABRIEL GLANTZ,
Pro Se

GABRIEL GLANTZ
870 Penobscot Building
Detroit 26, Michigan.

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